

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

KEVIN MITCHELL,

Plaintiff,

v.

EXPERIAN INFORMATION SOLUTIONS,
INC., CBA INFORMATION SERVICES,
BP/CITIBANK SD, CAPITAL ONE BANK,
CROSS COUNTRY BANK, DELL
FINANCIAL SERVICES, ORCHARD
BANK and PROVIDIAN FINANCIAL,

Defendants.

NO. 02 CV 4442

ANSWER OF ORCHARD BANK
TO CIVIL COMPLAINT OF KEVIN MITCHELL

Defendant, Orchard Bank (“Orchard”), by their attorneys, Whittlesey McDowell & Riga and McCabe Weisberg & Conway, hereby responds to the civil complaint (the “Complaint”) of Kevin Mitchell (“Plaintiff”) as follows:

Response to Section Titled “Preliminary Statement”

1. Denied as stated. It is admitted that Plaintiff seeks the relief outlined in paragraph 1 of the Complaint. It is specifically denied that Plaintiff is entitled to such relief as against Orchard. By way of further answer, certain allegations contained in paragraph 1 of the Complaint state conclusions of law to which no responsive pleading is required, and therefore, they are denied. By way of further answer, the allegations contained in paragraph 1 of the Complaint do not conform with the requirements of Rule 8(a) of the Federal Rules of Civil Procedure, and therefore, do not constitute a proper pleading.

Response to Section Titled "Jurisdiction and Venue"

2. It is admitted that this Court has jurisdiction over the Plaintiff's Complaint.
3. It is admitted that venue is properly laid in this district.

Response to Section Titled "Parties"

4. Denied. Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint, and therefore, those allegations are denied.

5. Denied. The allegations contained in paragraph 5 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint, and therefore, those allegations are denied.

6. Denied. The allegations contained in paragraph 6 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint, and therefore, those allegations are denied.

7. Denied. The allegations contained in paragraph 7 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint, and therefore, those allegations are denied.

8. Denied. The allegations contained in paragraph 8 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in

paragraph 8 of the Complaint, and therefore, those allegations are denied.

9. Denied. The allegations contained in paragraph 9 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint, and therefore, those allegations are denied.

10. Denied. The allegations contained in paragraph 10 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 10 of the Complaint, and therefore, those allegations are denied.

11. Admitted.

12. Denied. The allegations contained in paragraph 12 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 12 of the Complaint, and therefore, those allegations are denied.

Response to Section Titled "Factual Allegations"

13. Denied as stated as to Orchard. By way of further answer, once Orchard was made aware of the fraud, it took all reasonable and prompt steps to reverse the consequences of that fraud that were within its control.

14. Denied. By way of further answer, Orchard incorporates its reply to paragraph 13 of the Complaint here as if set forth here in its entirety.

15. Denied. By way of further answer, Orchard incorporates its reply to paragraph 13 of the Complaint here as if set forth here in its entirety. By way of further answer, Orchard lacks

sufficient information to form a belief as to the truth of certain of the allegations contained in paragraph 15 of the Complaint, and therefore, those allegations are denied.

16. Denied. The allegations contained in paragraph 16 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint, and therefore, those allegations are denied.

17. Denied. The allegations contained in paragraph 17 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 17 of the Complaint, and therefore, those allegations are denied.

18. Denied. The allegations contained in paragraph 18 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint, and therefore, those allegations are denied.

19. Denied. The allegations contained in paragraph 19 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 19 of the Complaint, and therefore, those allegations are denied.

20. Denied. The allegations contained in paragraph 20 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint, and therefore, those allegations are denied.

21. Denied. The allegations contained in paragraph 21 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 21 of the Complaint, and therefore, those allegations are denied.

22. Denied as to Orchard. By way of further answer, Orchard promptly conducted its investigation into the alleged fraud, and accepted as true the Plaintiff's claims at the conclusion of that investigation.

23. Denied. By way of further answer, Orchard incorporates its reply to paragraph 22 of the Complaint here as if set forth here in its entirety.

24. Denied. By way of further answer, Orchard incorporates its replies to paragraphs 13 and 22 of the Complaint here as if set forth here in its entirety.

25. Denied. Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 25 of the Complaint, and therefore, those allegations are denied.

26. Denied. Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 26 of the Complaint, and therefore, those allegations are denied.

27. Denied. Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 27 of the Complaint, and therefore, those allegations are denied. By way of further answer, Orchard incorporates its replies to paragraphs 13 and 22 of the Complaint here as if set forth here in its entirety.

28. Denied. Orchard lacks sufficient information to form a belief as to the truth of

the allegations contained in paragraph 28 of the Complaint, and therefore, those allegations are denied. By way of further answer, Orchard incorporates its replies to paragraphs 13 and 22 of the Complaint here as if set forth here in its entirety.

29. Denied. Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 29 of the Complaint, and therefore, those allegations are denied. By way of further answer, Orchard incorporates its replies to paragraphs 13 and 22 of the Complaint here as if set forth here in its entirety.

30. Denied. Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 30 of the Complaint, and therefore, those allegations are denied. By way of further answer, Orchard incorporates its replies to paragraphs 13 and 22 of the Complaint here as if set forth here in its entirety.

31. Denied. The allegations contained in paragraph 31 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 31 of the Complaint, and therefore, those allegations are denied.

32. Denied. The allegations contained in paragraph 32 of the Complaint state a conclusion of law to which no reply is required, and therefore, those allegations are denied.

33. Denied as to Orchard.

Response to Section Titled “COUNT ONE-FCRA (Plaintiff v. Experian and CBA)”

34. Orchard incorporates its previous responses as if set forth here in their entirety.

35. Denied. The allegations contained in paragraph 35 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer,

Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 35 of the Complaint, and therefore, those allegations are denied.

36. Denied. The allegations contained in paragraph 36 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 36 of the Complaint, and therefore, those allegations are denied.

37. Denied. The allegations contained in paragraph 37 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 37 of the Complaint, and therefore, those allegations are denied.

38. Denied. The allegations contained in paragraph 38 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 38 of the Complaint, and therefore, those allegations are denied.

39. Denied. The allegations contained in paragraph 39 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 39 of the Complaint, and therefore, those allegations are denied.

**Response to Section Titled “COUNT TWO-FCRA
(Plaintiff v. Citibank, Capital One, Cross Country, Dell, Orchard and Providian)”**

40. Orchard incorporates its previous responses as if set forth here in their entirety.

41. Denied. The allegations contained in paragraph 41 of the Complaint state a

conclusion of law to which no reply is required, and therefore, those allegations are denied.

42. Denied as to Orchard. By way of further answer, Orchard incorporates its replies to paragraphs 13 and 22 of the Complaint here as if set forth here in its entirety. By way of further answer, Orchard responds as follows:

- (a) For the purposes of this Complaint, Orchard was neither a consumer reporting agency nor a user of credit information;
- (b) Orchard had a legitimate business need for each consumer credit report of the Plaintiff it requested, if any;
- (c) Orchard has not willfully refused to comply with the Federal Credit Reporting Act in this matter;
- (d) Orchard has not obtained Plaintiff's consumer credit report by use of false pretenses;
- (e) Orchard has not reported any consumer credit information concerning the Plaintiff with knowledge that such information was erroneous;
- (f) Plaintiff, as an alleged victim of identity fraud, has no private right of action against Orchard, a mere provider of credit information; and
- (g) The cited statutory provisions allegedly violated by Orchard do not apply to a furnisher of consumer credit information.

43. Denied. By way of further answer, Orchard denies that it has caused the Plaintiff any harm or that its conduct would cause any reasonable person harm. By way of further answer,

Orchard denies that plaintiff is entitled to an award of damages. By way of further answer, Orchard denies that Plaintiff is entitled to statutory damages, the trebling of damages or the reimbursement of his litigation costs and attorneys' fees.

Response to Section Titled "COUNT THREE-DEFAMATION
(Plaintiff v. Experian and CBA)"

44. Orchard incorporates its previous responses as if set forth here in their entirety.

45. Denied. The allegations contained in paragraph 45 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 45 of the Complaint, and therefore, those allegations are denied.

46. Denied. The allegations contained in paragraph 46 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 46 of the Complaint, and therefore, those allegations are denied.

47. Denied. The allegations contained in paragraph 47 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 47 of the Complaint, and therefore, those allegations are denied.

48. Denied. The allegations contained in paragraph 48 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 48 of the Complaint, and therefore, those allegations are denied.

49. Denied. The allegations contained in paragraph 49 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 49 of the Complaint, and therefore, those allegations are denied.

50. Denied. The allegations contained in paragraph 50 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 50 of the Complaint, and therefore, those allegations are denied.

51. Denied. The allegations contained in paragraph 51 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 51 of the Complaint, and therefore, those allegations are denied.

52. Denied. The allegations contained in paragraph 52 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 52 of the Complaint, and therefore, those allegations are denied.

53. Denied. The allegations contained in paragraph 53 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 53 of the Complaint, and therefore, those allegations are denied.

54. Denied. The allegations contained in paragraph 54 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer,

Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 54 of the Complaint, and therefore, those allegations are denied.

**Response to Section Titled “COUNT FOUR-DEFAMATION
(Plaintiff v. Citibank, Capital One, Cross Country, Dell, Orchard and Providian)”**

55. Orchard incorporates its previous responses as if set forth here in their entirety.

56. Denied as to Orchard. By way of further answer, Orchard incorporates its replies to paragraphs 13 and 42 of the Complaint here as if set forth here in its entirety.

57. Denied as to Orchard. By way of further answer, Orchard incorporates its replies to paragraphs 13, 22 and 42 of the Complaint here as if set forth here in their entirety. By way of further answer, no communication by Orchard defamed the Plaintiff or was defamatory.

58. Denied as to Orchard. By way of further answer, Orchard incorporates its replies to paragraphs 13, 22 and 42 of the Complaint here as if set forth here in their entirety.

59. Denied as to Orchard. By way of further answer, Orchard incorporates its replies to paragraphs 13, 22 and 42 of the Complaint here as if set forth here in their entirety.

60. Denied as to Orchard. By way of further answer, Orchard incorporates its replies to paragraphs 13, 22 and 42 of the Complaint here as if set forth here in their entirety.

61. Denied. By way of further answer, the allegations contained in paragraph 61 of the Complaint state a conclusion of law to which no reply is required, and therefore, those allegations are denied.

62. Denied. By way of further answer, the allegations contained in paragraph 62 of the Complaint state a conclusion of law to which no reply is required, and therefore, those allegations are denied.

63. Denied as to Orchard. By way of further answer, Orchard incorporates its replies to paragraphs 13, 22 and 42 of the Complaint here as if set forth here in their entirety.

64. Orchard incorporates its reply to paragraph 43 of the Complaint here as if set forth here in its entirety.

Response to Section Titled “COUNT FIVE-CPL (Plaintiff v. Experian and CBA)”

65. Orchard incorporates its previous responses as if set forth here in their entirety.

66. Denied. The allegations contained in paragraph 66 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 66 of the Complaint, and therefore, those allegations are denied.

67. Denied. The allegations contained in paragraph 67 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 67 of the Complaint, and therefore, those allegations are denied.

68. Denied. The allegations contained in paragraph 68 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 68 of the Complaint, and therefore, those allegations are denied.

69. Denied. The allegations contained in paragraph 69 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 69 of the Complaint, and therefore, those allegations are denied.

Response to Section Titled “COUNT SIX-NEGLIGENCE (Plaintiff v. Experian and CBA)”

70. Orchard incorporates its previous responses as if set forth here in their entirety.

71. Denied. The allegations contained in paragraph 71 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 71 of the Complaint, and therefore, those allegations are denied.

72. Denied. The allegations contained in paragraph 72 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 72 of the Complaint, and therefore, those allegations are denied.

73. Denied. The allegations contained in paragraph 73 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 73 of the Complaint, and therefore, those allegations are denied.

Response to Section Titled “COUNT SEVEN-NEGLIGENCE (Plaintiff v. Citibank, Capital One, Cross Country, Dell, Orchard and Providian)”

74. Orchard incorporates its previous responses as if set forth here in their entirety.

75. Denied as to Orchard. By way of further answer, Orchard incorporates its replies to paragraphs 13, 22 and 42 of the Complaint here as if set forth here in its entirety. By way of further answer, Plaintiff has failed to allege the elements of negligence, and therefore, the conclusory allegations contained in paragraph 75 of the Complaint are denied. By way of further answer, it is denied that Orchard breached any duty it owed to the Plaintiff, if any. By way of

further answer, it is denied that any conduct or act of Orchard was the proximate cause of any harm to Plaintiff.

76. Denied as to Orchard. By way of further answer, Orchard incorporates its reply to paragraph 43 of the Complaint here as if set forth here in its entirety.

77. Denied as to Orchard. By way of further answer, Orchard incorporates its reply to paragraph 43 of the Complaint here as if set forth here in its entirety.

Response to Section Titled “COUNT EIGHT-INVASION OF PRIVACY/ FALSE LIGHT (Plaintiff v. Experian and CBA)”

78. Orchard incorporates its previous responses as if set forth here in their entirety.

79. Denied. The allegations contained in paragraph 79 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 79 of the Complaint, and therefore, those allegations are denied.

80. Denied. The allegations contained in paragraph 80 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 80 of the Complaint, and therefore, those allegations are denied.

81. Denied. The allegations contained in paragraph 81 of the Complaint are directed to defendants other than Orchard, and therefore, they are denied. By way of further answer, Orchard lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 81 of the Complaint, and therefore, those allegations are denied.

Response to Section Titled “COUNT NINE-INVASION OF PRIVACY/ FALSE LIGHT (Plaintiff v. Citibank, Capital One, Cross Country,

Dell, Orchard and Providian)"

82. Orchard incorporates its previous responses as if set forth here in their entirety.

83. Denied as to Orchard. By way of further answer, Orchard has made no intentional intrusion on the seclusion of Plaintiff's private life, and therefore, the allegations contained in paragraph 83 are denied. By way of further answer, Orchard denies that it unreasonably placed the Plaintiff in a false light before the public. By way of further answer, Orchard denies that it published a major misrepresentation of the Plaintiff's character, history, activities or beliefs sufficient to cause a reasonable man in Plaintiff's position to take serious offense to the publication, if any. By way of further answer, Orchard denies that it published anything about the Plaintiff that would cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

84. Denied as to Orchard. By way of further answer, Orchard incorporates its reply to paragraph 43 of the Complaint here as if set forth here in its entirety.

85. Denied as to Orchard. By way of further answer, Orchard incorporates its reply to paragraph 43 of the Complaint here as if set forth here in its entirety.

Response to Section Titled "JURY TRIAL DEMAND"

86. Denied. By way of further answer, the allegations contained in paragraph 86 of the Complaint do not conform with the requirements of Rule 8(a) of the Federal Rules of Civil Procedure, and therefore, do not constitute a proper pleading.

Response to Section Titled "PRAYER FOR RELIEF"

WHEREFORE, Orchard respectfully request that Plaintiff take nothing on his Complaint from Orchard, that the Complaint be dismissed with prejudice as against Orchard and that

Orchard be awarded its costs and attorneys' fees.

AFFIRMATIVE DEFENSES

AFFIRMATIVE DEFENSE ONE

Counts Four, Seven and Nine of the Complaint are preempted by the Plaintiff's Count Two under the Federal Credit Reporting Act, 15 U.S.C. §1681, et seq. (the "FCRA"), a federal statute that speaks definitively and completely on the alleged subject matter of the Complaint.

AFFIRMATIVE DEFENSE TWO

Counts Four, Seven and Nine of the Complaint are statutorily preempted by Sections 1681h(e) and 1681t(b)(F) of the FCRA.

AFFIRMATIVE DEFENSE THREE

All damages allegedly suffered by the Plaintiff, if any, were the result of acts or omissions of persons other than Orchard and over whom Orchard had neither control nor responsibility.

AFFIRMATIVE DEFENSE FOUR

Plaintiff's claim for punitive damages violates Orchard's constitutional rights.

AFFIRMATIVE DEFENSE FIVE

Plaintiff's claim for punitive damages is not permitted by the FCRA.

AFFIRMATIVE DEFENSE SIX

Plaintiff lacks standing on his FCRA claim pursuant to section 1681s-2 of that act.

AFFIRMATIVE DEFENSE SEVEN

The Complaint fails to state claims against Orchard upon which relief may be granted.

Dated: Maple Shade, NJ
October __, 2002

Respectfully submitted,

McCabe, Weisberg & Conway, P.C.
Suite 2080
First Union Building
123 South Broad Street
Philadelphia, PA 19109

-and-

Whittlesey McDowell & Riga
46 West Main Street
P.O. Box 127
Maple Shade, NJ 08056
(856) 482-5544

By: _____
Joseph F. Riga (PA Atty. ID No. 57716)

Co-counsel for Defendant, Orchard Bank

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true and correct copy of the foregoing Answer to Complaint of Kevin Mitchell was served by United States mail, postage prepaid, upon the following:

Mark D. Mailman, Esq.
100 S. Broad Street
Philadelphia, PA 19110

Robert J. Martin, Esq.
Lavin Coleman, et al.
Suite 1000, Penn Mutual Tower
510 Walnut Street
Philadelphia, PA 19106

Howard R. Maniloff, Esq.
Tabas & Rosen PC
1845 Walnut Street, 22nd Floor
Philadelphia, PA 19103

John K. Semler, Jr., Esq.
Ballard Spahr Andrews & Ingersoll LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

Dated: Maple Shade, NJ
October __, 2002

Joseph F. Riga

Co-counsel for Defendant, Orchard Bank